GOO AH SEE & ANOR.

v.

HOTEL MERLIN KUALA LUMPUR SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HJ. ABU MANSOR BIN ALI J
[ORIGINATING MOTION NO. R1-25-3 & R1-25-4 OF 1991]
10 NOVEMBER 1993

***INDUSTRIAL LAW**: Certiorari to quash award of Industrial Court - Sale of 1st respondent's shares to 3rd party by 2nd respondent - Sale agreement providing for continuation of service of 1st respondent's employees - Applicants/employees subsequently terminated - Matter referred to Industrial Court - Industrial Court only allowing claim against 1st respondent - Whether sale genuine - Whether a collusion between 2nd respondent and 3rd party to avoid payment of retrenchment benefits to applicants - Whether 2nd respondent equally responsible to compensate applicants.*

On 1 March 1988, the 2nd respondent, the owner of the 1st respondent sold all the shares of the 1st respondent to the Kuala Reman Estates Berhad (Kuala Reman) at RM2. The sale and purchase agreement provided for the continuation of the services of all the 1st respondent's employees (the applicants). On 5 March 1988 the applicants accepted the offer of continued employment but on 15 March 1988 they received termination notices from Kuala Reman. The applicants referred the matter to the Industrial Court and raised the issue of whether the sale was genuine or merely a collusion between the 2nd respondent and Kuala Reman to avoid paying retrenchment benefits to the applicants. The Industrial Court allowed the claim against the 1st respondent but found that the applicants had failed to prove collusion. The applicants applied by way of certiorari to quash part of the award of the Industrial Court which stated the 2nd respodent was not responsible to the applicants.

From the evidence it was clear that the 1st defendant was in very bad shape and had suffered an accumulated loss of 6.5 million ringgit and a monthly operating loss of over RM600,000. At that time the workforce was over 600 and the impending retrenchment benefits to be paid if the workers were terminated was 7 million, equivalent to 60% of the loss. Thereafter the decision was made to sell the 1st respondent to Kuala Reman. The applicants' Counsel contended that the 2nd respondent well knew that Kuala Reman had no intention of keeping all the workers after the purchase and that since the group manager, Haji Abdul Halim Ehsan was a director in both the 1st respondent and Kuala Reman he had knowledge of the state of affairs. This was not alluded to in the learned Chairman's grounds of decision. Furthermore Counsel for the respondents failed to challenge the evidence of witnesses of the applicants to the effect that the 2nd respondent's intention to sell was to shed off its responsibilities which amounted to an admission.

Respondents' Counsel submitted that the Industrial Court had decided that the 1st respondent under Kuala Reman had not acted unreasonably and as there had been a sale, the 2nd respondent should be released from its responsibilities for the workers. Counsel further submitted that as this matter was a certiorari application, the Court could only interfere if the Industrial Court had acted in excess of its jurisdiction.

Held:
Considered in its totality the Court cannot escape the conclusion that the clear intention of the 2nd respondent in selling the 1st respondent to Kuala Reman Estates was to escape its

obligation to compensate the employees due for termination. By a stroke of a pen, if that act can be excused, the 2nd respondent is freed from all responsibilities. Can their action be so interpreted that a Court of equity and good conscience cannot see that their act in so doing was tainted with a certain intention to free the 2nd respondent of its awesome responsibilities. This Court will not lend its aid to perpetrate that act.

[Applications allowed with costs].

(O/S No. R1-25-3-91)
For the applicants - Cedric Miranda; M/s. Jagjit Singh & Co.
For the 2nd respondent - Jagjeet Singh; M/s. Jeyaratnam & Chong
(O/S No. R1-25-4-91)
For the applicants - J. Rajaretnam; M/s. Lim Jaya & Co.,
For the 2nd respondent - Jagjeet Singh; M/s. Jeyaratnam & Chong

JUDGMENT

Hj. Abu Mansor bin Ali J:

Dalam usul pemula lampiran (5) R1-25-3-91 dan lampiran (11) R1-25-4-91 pemohon-pemohon memohon perintah-perintah berikut:

(i) Satu perintah certiorari kepada pihak penentang yang dinyatakan di atas untuk membatalkan sebahagian daripada keputusan yang dibuat di dalam Award No. 315/1990, bertarikh 26 November, 1990 di mana telah diputuskan bahawa pihak penentang kedua tidak bertanggungan kepada pihak pemohon.

(ii) Bahawa kesemua arahan-arahan yang perlu dan berbangkit hendaklah diberikan.

(iii) Bahawa kos permohonan ini dan kos sampingan hendaklah menjadi kos mengikut kausa.

The facts of this case are as follows. On or before 1 March 1988 Faber Merlin Malaysia (Faber) who was the owner of Hotel Merlin Kuala Lumpur Sdn. Bhd. (1st defendant) sold all the shares of 1st defendant's company to Kuala Reman Estates Berhad at RM2 and cl. 4(a) of the sale and purchase agreement provide for the continuation of the services of all employees in the 1st defendant company.

The sequence of events that took place was as follows. On 1 March 1988 the 1st defendant issued offers for absorption or employment of employees. On 5 March 1988 the employees accepted the offer and on 15 March 1988 all employees received termination notices from Kuala Reman Estates. All employees then referred the matter to the Industrial Court.

The issue that was raised by the applicants was whether the sale of 1st defendant by Faber was a genuine sale or otherwise. From the evidence of CW1, Abdul Aziz prior to the sale it was clear that the 1st defendant was in a very bad shape. It suffered an accumulated loss of 6.5 million ringgit with a monthly operating loss of over RM600,000. At that time it had a workforce of over 600 staff. This evidence is corroborated by 2nd witness Johari bin Ahmad. One Yusuf Abdul Rahman, the manager in Faber was given the task of forming an executive committee to oversee the administration of the 1st defendant. He confirmed the state of affairs of the 1st defendant and had held a number of meetings to resolve the matter.

It was also not disputed that they were unable to find a solution. The impending retrenchment benefit to be paid if the employment of the workers were terminated was 7 million. The payment to the staff was 60% of the loss. Then at the end of 1987 or early 1988 applicant submitted there was a proposal to sell the 1st defendant to a third party.

Then there was a decision to sell the 1st defendant to Kuala Reman Estates for RM2. The circumstances of the sale of the 1st defendant to Kuala Reman Estates was as follows. In the executive committee there was present the deputy chief executive and group manager of Faber at that time, called Hj. Abdul Halim Ehsan. This Abdul Halim Ehsan was at the same time one of the directors of Kuala Reman Estates. Kuala Reman Estates was introduced to Faber by Abdul Halim Ehsan. And so the 1st defendant came to be sold to Kuala Reman Estates on 1 March 1988.

What was not in dispute was under cl. 4(a) of the sale and purchase agreement 1st defendant was to retain all staff but 15 days after sale of 1st defendant to Kuala Reman Estates, the services of the staff was terminated by Kuala Reman Estates.

It is the contention of the applicants that Faber and Kuala Reman Estates well knew that Kuala Reman Estates after purchase were not going to keep all the workers as provided for in the sale and purchase agreement cl. 4(a).

The applicants further contended that since Haji Abdul Halim Ehsan was the director in both companies his knowledge of the state of affairs in the 1st defendant company was too transparent.

This state of affairs was supported by the evidence of witness C23 Yusuf Abdul Rahman. He did not agree to the proposal of Faber to sell the 1st defendant to Kuala Reman Estates for very good and cogent reasons. The paid-up capital of Kuala Reman Estates was only RM14,000 and Kuala Reman Estates had never delved in the business of hoteliers before. He asked the correct question why should an organisation such as Kuala Reman Estates want to buy a hotel with such huge accumulated loss and such monthly loss. When Yusuf disagreed he was left out of that transaction and when the sale agreement was signed, the liabilities of the 1st defendant was left blank.

The applicant argued that from the above uncontradicted facts it was clear that the sale of the 1st defendant to Kuala Reman Estates was not a genuine sale but an attempt of Faber to free itself of the responsibilities even though the termination was after the sale on 15 March 1988. By this device Faber and Kuala Reman Estates was able to terminate the service of the applicants.

Since this is the true situation at the time of the dismissal, the applicants pray that Faber should also be made responsible as Kuala Reman Estates, in the payment of the retrenchment benefits to the dismissed employees. The promise of Kuala Reman Estates to pay 3 months wages to them was still unfulfilled.

The learned Chairman made a finding that applicants failed to prove there was a joint effort or consorting between Faber and Kuala Reman Estates to dismiss them. They argued that this consorting is clear from the evidence of Yusuf Abdul Rahman. If his evidence is scrutinised minutely, it is apparent that the sale of the 1st defendant to Kuala Reman Estates was a device in order that the workers could be dismissed and to free Faber of its responsibilities. The applicants apply for orders prayed for.

Mr. Segran, Counsel for the applicants in R1-25-4-1991 supports the application of Counsel for the applicants in R1-25-3-1991 and associate himself with the same argument that the intention of Faber and Kuala Reman Estates in the transfer was really to dismiss the 1st defendant's workers. Faber and the 1st defendant were sued together. The Industrial Court only allowed the applicants' claim against the 1st defendant. Assuming Faber is also liable the prayer against Faber is the same.

Counsel also told the Court it is also to be noted in the learned Chairman's grounds of decision there is an omission to allude to the position of Hj. Abdul Halim in Kuala Reman Estates. Also important to note is the failure of Counsel for Faber to challenge the evidence of witnesses of applicants C1, C23 and CW1 Abdul Aziz Abdul Halim, a director of the 1st defendant and Faber before the Industrial Court at p. 6 to the effect that Faber's intention to sell was to shed off its responsibilities. There was omission by Faber's Counsel to challenge this statement or to cross-examine him on it and it amounts to admission. It was also important to note that CW2 Johari Ahmad, operations director of the 1st defendant who was seconded to Kuala Reman Estates was not able to answer why Kuala Reman was buying this hotel.

Counsel submitted that it is trite law that to prove fraud there must be strong and clear-cut evidence and a high standard of proof is needed. The Industrial Court is a Court of equity and good conscience and must not be bound by technicalities Counsel submitted. Counsel said it is only reasonable to find on the evidence that Faber and Kuala Reman wanted to terminate worker without compensation. The learned Chairman's finding that the 1st defendant was sold for RM2 must also be found to be unreasonable.

Miss C.K. Lim for the respondent in reply said the Industrial Court had found and decided that the 1st defendant under Kuala Reman Estates was found by the learned Chairman not to have acted unreasonably and did not act unfairly in paying 3 months salary as compensation when the 1st defendant terminated the services of 21 employees on 15 March 1988. Miss Lim further submitted that as there has been a sale Faber should be released from its responsibilities for the workers.

She further submitted this Court is to have regard as this matter is not an appeal but a certiorari application. This Court would only interfere if the Industrial Court had acted in excess of its jurisdiction. The issue is whether the Industrial Court Chairman had asked the correct question. The learned Chairman can make a mistake it can still be within the jurisdiction to make.

Counsel asked the question has fraud been committed by Faber?

After some postponements, the respondent was later represented in Court by Mr. Jagjeet Singh in both cases. I find Mr. Jagjeet Singh's argument was only a repetition of what had been submitted by Miss Lim earlier and much was a going over of the same arguments.

I have considered this application and I come to a decision that I uphold the submission of learned Counsel for both applicants that considered in its totality this Court cannot escape the conclusion that the clear intention of Faber in selling the 1st defendant to Kuala Reman Estates was to escape its obligation having to compensate the employees due for termination. By a stroke of a pen, if that act can be excused, frees Faber from all their responsibilities. Can their action be so interpreted that a Court of equity and good conscience cannot see that their act in so doing was tainted with a certain intention to free Faber of its awesome responsibilities. This Court will not lend its aid to perpetrate that act.

I therefore allow both applications in 3/91 and 4/91 as prayed with costs.